IN THE

Supreme Court of the United States

October Term, 1964

No. 52

JAMES A. DOMBROWSKI, *et al.*,

Appellants,

—v.—

JAMES H. PFISTER, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioner, NAACP Legal Defense and Educational Fund, Inc., respectfully moves this Court for permission to file the attached brief *amicus curiae* for the following reasons:

This case presents the issue of whether the civil rights decisions of this Court and the civil rights legislation enacted by the Congress may be deprived of significance by attacks on their advocates.

According to the record here, the plaintiffs-intervenors are two lawyers practicing in New Orleans; they have been active in civil rights cases, representing Negroes in desegregation cases and other litigation asserting rights conferred by the Constitution.

Acting on a search warrant issued under color of certain Louisiana statutes, city and state police conducted a search

at gun point of the law offices of the plaintiffs-intervenors. The police inspected all of the lawyers' confidential legal files and seized and took away some of them.

The purpose of this search, according to plaintiffs-intervenors, was to destroy their work in the field of civil rights. Anticipating further action under color of the same statutes, plaintiffs-intervenors asked the Court below for injunctive relief and for a declaration that the statutes are unconstitutional on their face and as applied. The requested relief was refused without a hearing.

Thus, according to the decision below, an unconstitutional statute may be used to destroy the work of lawyers engaged in civil rights cases, and the federal courts will withhold relief.

The interest of petitioner NAACP Legal Defense and Educational Fund in any such ruling is, we suggest, manifest. Petitioner is a New York corporation organized for the purpose, among others, of securing equality before the law, without regard to race, for all citizens. For many years, we have been the principal organization regularly supplying the legal services to Negro citizens who claim that they have been denied equal protection of the laws, due process of law and other rights secured by the constitution and laws of the United States. N. Y. Times, June 28, 1964, p. 46, c. 1, 2.

While we have no connection with the plaintiffs-intervenors in this case, and have not worked with them in the past, if the files of our legal staff and our cooperating attorneys may be subjected to the same lawless invasion as is here alleged to have occurred, without relief being available in the federal courts, our activities and, indeed, the cause of civil rights will be most severely prejudiced.

The problem would perhaps be of lesser consequence were a plethora of advocates available to represent civil rights causes. But the precise opposite is true. According to a survey conducted by the United States Commission on Civil Rights, 1963 Report, 117-9, only a small segment of the Southern bar handles civil rights issues. And from our own experience we know that, until 1961, only one lawyer in Mississippi handled civil rights litigation, and even today there are only three. Only this summer has the Mississippi Bar Association adopted a resolution asserting the duty of its members to appear in civil rights cases.[1] But results from this resolution are yet to be made clear and there is no reason to believe that there will soon be a drastic change.

In part, this dearth of counsel is doubtless due to the social pressures which are brought to bear on advocates of civil rights causes. One-third of the lawyers who reported to the Commission on Civil Rights that they had handled civil rights cases reported also that they had suffered threats of physical violence, loss of clients, or social ostracism as a result. *Ibid.* The Fifth Circuit, in *United States* v. *Harpole,* 263 F. 2d 71, 82 (1959) noted that lawyers who "fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism."

The present case and similar instances demonstrate that the pressures are not merely business or social: in many areas, civil rights advocates face governmental and judicial action which has no parallel in the experience of counsel who do not appear in civil rights causes. Among the more disquieting examples are:

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[1] Resolution, Board of Bar Commissioners of the Mississippi State Bar, July 15, 1964.

1. Disbarment proceedings were begun in 1959 against S. W. Tucker, Esq., a Negro member of the Virginia bar, on charges that, in 1950 and 1952, he appeared in three cases at the behest of the NAACP. Only after a year of litigation were the charges dismissed. *Matter of S. W. Tucker*, Circuit Court, Greensville County, Virginia. Feb. 15, 1962. Case filed as "ended Law case #407".

2. Disciplinary proceedings were begun against R. Jess Brown, Esq., a Negro member of the Mississippi bar, on the grounds that, in a school desegregation case, he had appeared for one of 13 plaintiffs without authority and had inserted an unfounded allegation in the complaint. After a hearing which demonstrated that Mr. Brown's appearance *was* authorized and the allegation was not groundless,[2] the citation was discharged, but costs were taxed against Mr. Brown on the apparent ground that he had demonstrated his innocence only at the hearing. *In the Matter of R. Jess Brown*, Civ. No. 3382 (S. D. Miss. 1963), appeal pending (5th Cir., No. 21224). Mr. Brown is the Mississippi attorney earlier mentioned who has handled civil rights cases since before 1961. Cf. Harvard Law Record, March 7, 1963, p. 1; N. Y. Times, July 4, 1963, p. 38, c. 1, concerning the disbarment of a white Mississippi attorney who represented Episcopalian ministers involved in the Jackson Freedom Rides.

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[2] The unfounded allegation was that shots had been fired into the home of a named plaintiff. In point of fact, however, shots were fired into a cafe owned by that plaintiff, into the homes of at least six of her neighbors, and into her brother's home. *In the Matter of R. Jess Brown*, Record on Appeal, pp. 96-97, 225-9; Supplemental Record 338, 370.

3. Tobias Simon, Esq., appeared for the Florida Civil Liberties Union in cases involving hundreds of civil rights demonstrators. He has appeared also in this Court in civil rights cases. In a local Tallahassee court, he was charged with contempt for having failed to appear on behalf of a young girl arrested in a civil rights demonstration. Following the efforts of his counsel, Florida's former governor, Fuller Warren, Esq., the charges were ultimately dismissed. *City of Tallahassee* v. *Patricia Due,* No. 18863—Chancery, Cir. Ct., Tallahassee, Fla.

4. Howard Moore, Jr. and Donald L. Hollowell, of the Georgia bar, were recently ordered to show cause why they should not be held in contempt of court because of a motion which they filed to recuse Judge Durwood T. Pye on the grounds of bias and prejudice. The contempt citation followed the denial of the motion by Judge Pye, who described the very presentation of the motion as an insult to the court. The hearing on the order to show cause has been continued. Cf. *Ashton Bryan Jones* v. *State of Georgia,* No. 506, October Term, 1964, see certified transcript, pp. 45-84.

5. Charles Morgan, Jr., a successful practicing Birmingham attorney, was forced to leave Alabama after speaking out against the bombing of a Negro church where four Negro Sunday School children were killed. His experience is detailed in: *A Time to Speak* (Harper & Row, New York, N. Y., 1964).

Among actions taken against civil rights organizations operating in the courts, see *NAACP* v. *Button,* 371 U. S. 415 (1963); *NAACP* v. *Committee on Offenses Against Administration of Justice,* 201 Va. 890, 114 S. E. 2d 721 (1963); *Texas* v. *NAACP,* District Court No. 56-649, 7th Judicial District, Smith County, Texas, May 8, 1957; *Arkansas ex rel. Bennett* v. *NAACP Legal Defense Fund,*

No. 44679 (Cir. Ct., Pulaski County); *Arkansas ex rel. Bennett* v. *NAACP Legal Defense Fund,* No. 45183 (Cir. Ct., Pulaski County); *NAACP Legal Defense Fund* v. *Gray,* Civ. No. 2436 (E. D. Va.).

The courts can, of course, do little about the social and economic pressures which operate against counsel in civil rights matters. All the more reason then, we respectfully suggest, for speedy judicial intervention in behalf of those counsel who suffer from official action.

Because of the broad significance of this case, which may not adequately appear in argument on behalf of the parties, we respectfully submit that the views of petitioner may be of interest to the Court.

We have asked permission of the parties to file this brief *amicus curiae;* counsel for appellees refused.

WHEREFORE petitioner prays that the attached brief *amicus curiae* be permitted to be filed with this Court.

Respectfully submitted,

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BRIEF *AMICUS CURIAE*

This brief speaks only to the question whether the doctrine which *Douglas* v. *Jeannette,* 319 U. S. 157 (1943), broadly and unnecessarily[1] announced should now be disapproved. The jurisdiction, in a strict sense, of the three-judge federal district court below to enjoin the enforcement of state criminal statutes found, on their face or as administered, to violate the Fourteenth Amendment civil rights of the plaintiffs is clear beyond cavil,[2] and the in-

[1] *Douglas* v. *Jeannette* might have been disposed of simply on the ground put forth in 319 U. S. at 165, that the ordinance sought to be enjoined was that very day declared unconstitutional in *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), and nothing in the record suggested that the threat of its enforcement endured a decision of the Supreme Court striking it down.

[2] The *Jeannette* case itself so says, 319 U. S. at 162; and see *Bush* v. *Orleans Parish School Board,* 194 F. Supp. 182 (E. D. La. 1961) (3-judge court), *aff'd per curiam,* 368 U. S. 11 (1961); *Browder* v. *Gayle,* 142 F. Supp. 707 (M. D. Ala. 1956) (3-judge court), *aff'd per curiam,* 352 U. S. 903 (1956).

applicability of the statutory bar of 28 U. S. C. § 2283 (1958) evident.[3] Nevertheless, language in *Jeannette* does support the refusal of a federal court to enjoin prosecution under even a state statute which infringes the "supremely precious"[4] freedoms of the First Amendment, and the relegation of those freedoms to the "remedy" of state prosecution and appeal.[5] It is the contention of this *amicus* that such refusal is impermissible, and that federal equity should entertain injunctive challenges to state criminal statutes claimed invalid under the First and Fourteenth Amendments, quite without regard to whether a plaintiff undertakes (as the present plaintiffs did) the onerous evidentiary burden of showing that defendant state officials are conspiring to deprive the plaintiff of his federal constitutional rights.

Amicus recognizes at the outset that this issue is not easily resolved. There are weighty justifications for this Court's reluctance, manifest in several forms, to permit the federal courts' involvement in state criminal prosecutions until those prosecutions have finally come to rest in the state courts. Abstention pending state court litigation avoids potentially unnecessary federal constitutional decision, acknowledges state legitimate concern for the expeditious administration of state criminal law, and declines to

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[3] See Judge Wisdom's dissenting opinion below.

[4] *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963). Cf. *Palko* v. *Connecticut*, 302 U. S. 319, 326-327 (1937); *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946), and authorities cited; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269-270 (1964), and authorities cited.

[5] Of course, even the language of *Jeannette* does not support the result below. The premise of *Jeannette* is that "No person is immune from prosecution in good faith for his alleged criminal acts." 319 U. S. at 163. Plaintiffs here allege bad faith prosecution. This *amicus* does not press the issue of bad faith, however; bad faith being a virtually impossible matter to prove in many cases where in fact it exists, the *amicus* seeks a broader ground of federal equity.

make available collateral sniping devices susceptible of abuse to disrupt orderly state court proceedings. Cf. *Virginia* v. *Rives*, 100 U. S. 313 (1879) (limiting civil rights removal statute to exclude cases where removal is sought by reason of speculative claims of federal constitutional violation at future state trial); *Ex parte Royall*, 117 U. S. 254 (1886) (authorizing discretionary denial of federal habeas corpus to try in advance of state criminal trial issues fairly triable in the state prosecution); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), and *Cleary* v. *Bolger*, 371 U. S. 392 (1963) (disallowing federal suppression of evidence to be offered at state criminal trial). As the cited cases reflect, the seriousness of potential disruption of state processes by federal court anticipatory action is greatest where—unlike the present case—state prosecutions have once been begun and are actually underway. And, of course, none of the doctrines of federal judicial abstention are so steel-clad as not to admit of exceptions where particularly sensitive federal interests are implicated. See, *e.g.*, the exception to *Royall* recognized in *In re Neagle*, 135 U. S. 1 (1890); *In re Loney*, 134 U. S. 372 (1890); *Hunter* v. *Wood*, 209 U. S. 205 (1908); the exception to *Stefanelli* recognized in *Rea* v. *United States*, 350 U. S. 214 (1956); cf. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), *infra*.

Weighing against the considerations which favor federal abstention where the state criminal process touches federally protected freedoms of expression are certain hard realities. Consider the consequences of a federal district court's refusal, on *Jeannette* grounds, to enjoin a state statute which criminally punishes First Amendment protected conduct:

(1) Persons exercising First Amendment freedoms will be arrested for prosecution. The arrests may cost them their jobs or such benefits as unemployment compensation.

See, e.g., *Baines* v. *Danville*, 4th Cir., Nos. 9080-9084, 9149-9150, 9212, decided August 10, 1964. In order to obtain their release from jail pending trial, they will have to make bail in amounts and forms which the reporters of BAIL IN THE UNITED STATES: 1964, A REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (May 27-29, 1964) found are frequently set in civil rights cases "as punishment or to deter continued [civil rights activity]. . . ." *Id.* at 53. Professional bonds will often be the only practicable way to make bail; once paid, the premiums are irrecoverably lost to the defendants, whatever the outcome of the prosecution.

(2) The cases will come to criminal trial in a state court. As this Court knows, see e.g., *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Fields* v. *South Carolina*, 375 U. S. 44 (1963), statutes repressive of free expression lend themselves to mass prosecutions, mass trials. The burden of conducting a defense in such trials is indescribable. Apart from the obvious problem that legal manpower willing to undertake the defense is least available in areas where it is most needed, see *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 443 (1963); *Lefton* v. *Hattiesburg*, 333 F. 2d 280, 286 (1964), the protection of an individual defendant's interests in such trials is next to impossible. Following trial and conviction, state appeals will be taken. Appeal or appearance bonds will be required, unless *forma pauperis* procedure is employed. Realistically, *forma pauperis* procedure is that in name only, for the cost in fees and time of securing the required notarized pauper's oaths for several hundred defendants is itself considerable.

(3) The defendants will attempt to preserve their federal claims as they run the gauntlet of state appellate procedure. Some will succeed, with assistance from this Court,

e.g., *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Barr* v. *Columbia*, 378 U. S. 146 (1964). Others will fail, e.g., *Arceneaux* v. *Louisiana*, 376 U. S. 336 (1964); *Dresner* v. *Tallahassee*, 375 U. S. 136 (1963); —— U. S. ——, 84 S. Ct. 1895 (1964).

(4) Those who preserve their federal claims on the merits will ask this Court to review their convictions on records in which all testimonial conflicts have been resolved by state judges or juries. Unfavorable findings of fact will lose federal constitutional rights. E.g., *Feiner* v. *New York*, 340 U. S. 315 (1951).

(5) With so many vicissitudes and contingencies of litigation standing as potential obstacles to the ultimate vindication of their federal claims, many persons will simply forego the exercise of their constitutional rights of free expression rather than run the risk of prosecution. See *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432-438 (1963); *Baggett* v. *Bullitt*, 377 U. S. 360, 375-379 (1964). And this repression of free expression will be unequal in its effect, for the discretion of the prosecuting agencies and the expectable hostility of state courts and juries will weigh with particular force upon the proponents of unpopular causes.

These being the facts which this Court's own experience has exposed, does the doctrine of *Douglas* v. *Jeannette*, remitting to state prosecution plaintiffs who invoke the federal civil rights injunctive jurisdiction given by 28 U. S. C. § 1343 (1958) and Rev. Stat. § 1979, 42 U. S. C. § 1983 (1958) to challenge state criminal statutes under the First and Fourteenth Amendments, strike a balance consistent with the appropriate relations between state and national courts? The question is in the first instance one of construction of the jurisdictional statutes, for (subject to constitutional restrictions not arguably involved here) Con-

gress is given by the Constitution the primary responsibility in designing the shape of our federalism—particularly as regards the effect of the Fourteenth Amendment, U. S. CONST., AMEND. XIV, § 5—and in defining the role of the federal courts in effectuating its goals, U. S. CONST., ART. III, § 1.

The plaintiffs here seek relief under statutes originating in the first section of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, an enactment which this Court has found was intended "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961). In addition to the 1871 legislative background carefully canvassed in *Monroe* v. *Pape*, the larger sweep of history is instructive. During three quarters of a century following the First Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, Congress acted substantially on the principle "that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme Court." HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727 (1954). It was not then supposed that the necessary and proper place for the trial litigation of all issues of federal law was in the lower federal courts, and no general federal question jurisdiction was given those courts.[6] Particularly were the lower federal courts excluded from involvement in the state crim-

[6] Save in the federalist Act of February 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, repealed by the Act of March 8, 1802, ch. 8, 2 Stat. 132.

inal process,[7] although from time to time limited incursions were authorized in classes of cases where there was more than ordinary reason to distrust the state judicial institutions.[8] With the advent of the Civil War, Congress multiplied the incursions,[9] and subsequently the Reconstruction commanders, familiar with the temper of the state courts, withdrew from those courts civil and criminal jurisdiction over cases involving Union soldiers and freedmen, and gave the jurisdiction to national military tribunals.[10]

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[7] See particularly § 14 of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 81-82, excepting state prisoners from the federal habeas corpus jurisdiction.

[8] In the face of New England's resistance to the War of 1812, see 1 MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC 426-429 (4th ed. 1950), federal removal jurisdiction was extended to civil and criminal cases involving federal customs officials in 1815. Act of February 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; Act of March 3, 1815, ch. 43, § 6, 3 Stat. 231, 233. South Carolina's resistance to the tariff in 1833, see 1 MORISON & COMMAGER, *supra*, 475-485, evoked the Force Act of March 2, 1833, ch. 57, §§ 3, 7, 4 Stat. 632, 633, 634, creating civil and criminal removal jurisdiction for cases involving federal revenue officers and habeas corpus jurisdiction to discharge all persons confined for acts done under federal authority. McLeod's case (*People* v. *McLeod*, 25 Wend. 482 (Sup. Ct. N. Y. 1841)) gave rise to the habeas corpus extension of the Act of August 29, 1842, ch. 257, 5 Stat. 539. See *In re Neagle*, 135 U. S. 1, 71-72 (1890).

[9] The removal provisions of the 1833 act, note 8 *supra* were extended to cover cases involving internal revenue collection. Act of March 7, 1864, ch. 20, § 9, 13 Stat. 14, 17; Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241; Act of July 13, 1866, ch. 184, §§ 67-68, 14 Stat. 98, 171, 172. Further, the Act of March 3, 1863, ch. 81, § 5, 12 Stat. 755, 756, authorized removal of civil and criminal cases brought in the state courts against persons for acts done during the rebellion under color of authority derived from presidential order or act of Congress. Procedures under the 1863 act were improved by the Act of May 11, 1866, ch. 80, 14 Stat. 46, and the Act of February 5, 1867, ch. 27, 14 Stat. 385.

[10] See Cong. Globe, 39th Cong., 1st Sess. 1834 (4/7/66); DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 147, 156-163 (1898).

The War radically altered the view which the national legislature had previously taken, that generally the state legislatures, courts and executive officials were the sufficient protectors of the rights of the American people. The Thirteenth, Fourteenth and Fifteenth Amendments wrote into the Constitution broad new guarantees of liberty and equality in which the federal government committed itself to protect the individual against the States. The four major civil rights acts undertook to elaborate and effectively establish the new liberties and, significantly, each of the acts contained jurisdictional provisions making the federal courts the front line of federal protection.[11] No longer was it assumed that the state courts were the normal place for the enforcement of federal law save in the rare and narrow cases where they affirmatively demonstrated themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights. FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 64-65 (1928). This is apparent in the enactment of the Act of February 5, 1867, ch. 28, 14 Stat. 385, the federal habeas corpus statute now found in 28 U. S. C. § 2241(c)(3) (1958), which assured that every state criminal defendant having a federal defensive claim would have a federal trial forum for the litigation of the facts underlying that claim. See *Brown* v. *Allen*, 344 U. S. 443 (1953); *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). It is apparent in the Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470, which created general federal question jurisdiction in original and removed civil actions and thus wrote permanently into national law the provision of a federal

[11] Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27; Act of May 31, 1870, ch. 114, §§ 8, 18, 16 Stat. 140, 142, 144; Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13; Act of March 1, 1875, ch. 114, § 3, 18 Stat. 335, 336.

trial court for every civil litigant engaged in a significant controversy based on a claim arising under the federal Constitution and laws. See 28 U. S. C. §§ 1331, 1441 (1958). Particularly, in view of the Reconstruction Congress' overriding concern for the effective enforcement of civil rights, it is manifest in the supervening federal trial jurisdiction created by § 1 of the Ku Klux Act of 1871, now Rev. Stat. § 1979, 42 U. S. C. § 1983 (1958), and 28 U. S. C. § 1343 (1958). *Monroe* v. *Pape*, 365 U. S. 167 (1961), *supra; McNeese* v. *Board of Education*, 373 U. S. 668 (1963). "There Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern." *Wechsler, Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948).

Seen against this background, it respectfully is submitted, the broad language of *Douglas* v. *Jeannette* errs in two fundamental aspects. First, it fails to give due regard to the Congressional judgment of importance of federal judicial protection of federal civil rights under the pattern of federalism which emerged from the post-war amendments and enforcing legislation. Second, it ignores the large shift in congressional temper which caused the Reconstruction Congress—framers of the federal civil rights jurisdiction—to see the federal courts, not the state courts, as the generally fitting forum for the litigation of questions of federal law; and it thereby overlooks the inconsistency with congressional purpose of remitting to the state courts litigants for whose particular protection from the state courts federal trial jurisdiction was created. This

is not to deny the legitimacy of *Jeannette's* concern for the state interest in state criminal law administration. The problem is to weigh that interest appropriately. Where a state statute is challenged on its face under the First and Fourteenth Amendments—where a sustainable claim is made that the statute in any and every instance and application violates freedom of expression—a State's interest in that statute's undisturbed administration seems hardly to preponderate over the prejudice to federal freedoms of their suppression during "an undue length of time" required for their vindication in the hazards and delays of state criminal litigation. *Baggett* v. *Bullitt*, 377 U. S. 360, 379 (1964). And where the statute is attacked as applied—where its application to a particular set of facts is claimed to infringe First-Fourteenth Amendment rights—it is all the more important that the trier of the facts be a federal trier. Holding last Term that a federal-question plaintiff remitted to state court civil proceedings under the abstention doctrine was entitled to return for federal trial of issues of fact at the conclusion of the state proceeding, this Court said:

> "Limiting the litigant to review here [the Supreme Court] would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' *Townsend* v. *Sain*, 372 U. S. 293, 312. 'There is always in litigation a margin of error, representing error in fact finding. . . .' *Speiser* v. *Randall*, 357 U. S. 513, 525. . . . The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *England* v. *Louisi-*

ana State Board of Medical Examiners, 375 U. S. 411, 416-417 (1964).

The *Jeannette* doctrine, of course, does precisely what *England* says may not be done: in a case admittedly within congressionally given federal trial jurisdiction, it refuses to hear the plaintiff and sends him into a state criminal trial from which there is no federal trial return.[12] This it does notwithstanding, in cases touching First Amendment liberties, the delays and dangers of state criminal trial may appear to him so costly that suppression is the better part of valor.

Amicus urges the Court to restrict *Jeannette* to its facts and, reversing the judgment below, make clear the obligation of the federal district courts to enjoin enforcement of state criminal statutes which on their face or in their threatened application violate federal freedoms of expression. Such a mandate to the district courts is a matter of urgent necessity. It is no hyperbole to say that the critical issues of human liberty in this country today are not issues of rights, but of remedies. The American citizen has had a right to a desegregated school since 1954 and to a desegregated jury since 1879, but schools and juries throughout vast areas of the country remain segregated. The American citizen has a right of free expression, but he may be arrested, jailed, fined under the guise of bail and put to every risk and rancor of the criminal process if he expresses himself unpopularly. The "right" is there on paper; what is

[12] Except via the post-conviction habeas corpus route, with its inevitable delay, and subject to the discretion of the federal district judge to deny the habeas petitioner an independent federal trial of the facts under *Townsend* v. *Sain*, 372 U. S. 293 (1963). In cases where First Amendment attack is made upon the criminal statute on which the prosecution or threatened prosecution is based, anticipatory federal injunction no more intrudes into state criminal administration than post-conviction federal habeas corpus: the only significant difference is that the first remedy is timely and effective, while the latter is not.

needed is the machinery to make the paper right a practical protection. Congress created some part of that machinery in the federal injunctive jurisdiction given in 1871. There remains to make the machine work. If it does not, it is merely delusive to suppose that the "basic guarantees of our Constitution are warrants for the here and now . . ." *Watson* v. *Memphis*, 373 U. S. 526, 533 (1963).

CONCLUSION

As set forth in the above Motion for leave to file this brief *amicus curiae*, the decision of the court below subjects lawyers engaged in civil rights cases to prosecution under unconstitutional statutes with clearly predictable harm to both the attorneys and those whom they are attempting to help. It is submitted that the doctrine of *Douglas v. Jeannette* is inapplicable and that federal courts have both jurisdiction to hear this case and ample statutory authority to grant the relief to which appellants are entitled, and which all such attorneys must have to continue representing persons seeking vindication of constitutional rights in the courts.

Respectfully submitted,

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